THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: BVIHCV 2017/0217
BVIHCV 2017/0218

BETWEEN:

EARL HODGE
and
ROBERTO HARRIGAN

Applicants

and

SUPERINTENDENT OF PRISONS
THE ATTORNEY GENERAL

Respondents

APPEARANCES:

Edward Fitzgerald QC for the Applicant Earl Hodge
Ben Cooper and Patrick Thompson for the Applicant Roberto Harrigan
John Black QC and Penelope Small for the Respondents

2018: April 16th, 17; May 14th
June 29th

JUDGMENT

[1] SMITH J: The United States of America seeks the extradition of Earl Hodge, a citizen of the British Virgin Islands ("the BVI") and Roberto Harrigan, a belonger of the BVI. "Belonger" is a status closely akin to that of being a citizen. The US indictment charges them with participation in a Caribbean-based drug trafficking organization that transported cocaine by plane and boat from Venezuela and other

points in South America to Caribbean islands and Central America and then on to Puerto Rico, Miami-Dade County, Florida and elsewhere in the United States. They are alleged to have controlled and participated in a narcotics collection and distribution center operating from the BVI and were responsible for the possession and distribution of cocaine.

[2] The evidence suggests that the vast majority of the drugs and proceeds of the drugs were being trafficked out of the jurisdiction of the BVI. There can be no doubt that the harm and the impact of this international drug trafficking were felt across several jurisdictions. It is in fact a huge global issue which attacks the fabric of our societies. It is an especially acute problem for small territories like the BVI that are severely under-resourced to combat this multi-billion dollar behemoth that is the illegal narcotics industry.

[3] Mr. Hodge and Mr. Harrigan, the Applicants, vigorously resist extradition to the United States. They wish to be tried in the BVI for their alleged offences. They therefore seek writs of habeas corpus against the decision of Magistrate Innocent committing them to custody pending the issuing of a warrant by the governor for their surrender to the United States. This is the third attempt to have the Applicants extradited from the BVI to be tried in the United States. It will be necessary to advert to the proceedings related to the two previous attempts later in this judgment.

[4] In these proceedings, the Applicants seek to have their committal quashed and orders for habeas corpus made. They say that, firstly, their previous discharge on writs of habeas corpus from Redhead J. operates as an absolute bar to any further attempt to extradite them. Secondly, they say that the only appropriate forum for their trial for the alleged criminal acts is the BVI and that, for a conglomeration of reasons, it would be unjust, oppressive, abusive and unconstitutional to extradite them now to face trial in the United States. Thirdly, they say that there is no *prima facie* case against them.

Issues

[5] From those grounds, the following issues arise for this court's determination:

(1) Whether the previous order for habeas corpus made by Redhead J for the release of the Applicants constitutes a bar to this third attempt to extradite them?

(2) Whether, in all the circumstances of this case, it is unjust, oppressive, abusive and or unconstitutional to now extradite the Applicants?

(3) Whether there is a *prima facie* case against the Applicants?

[6] At the start of the hearing, Mr. Fitzgerald QC moved an application under Part 32 of the Civil Procedure Rules to adduce the expert evidence of Ms. Rebecca Schaeffer addressing the likely sentences and penalties which the Applicants would be exposed to if extradited to the United States. Mr. Black QC made perfunctory protestations about the lateness of the application but, ultimately, did not object to it. Instead, he requested time to put in an expert report in rebuttal to that of Ms. Schaeffer as well as post-hearing submissions and authorities in response to submissions made by the Applicants based on Ms. Schaeffer's evidence.

[7] Both counsel agreed that the Respondents' post-hearing materials would be filed by 27th April 2018 and any response from the Applicants would be filed by 11th May 2018. The court therefore granted the application for Ms. Schaeffer's affirmation to be tendered into evidence and for Mr. Black to adduce expert evidence in rebuttal. As it turned out, the Respondents' post-hearing evidence, submissions and authorities were not filed until 30th May 2018 and the Applicants' materials in reply were filed on 14th May 2018. This judgment considers arguments and evidence made at the hearing as well as the post-hearing material.

Overview of Previous Proceedings

[8] I do not think it will serve any useful purpose to undertake a *tour d' horizon* of the two previous proceedings concerning the earlier attempts to extradite these Applicants. Those proceedings are the subject matter of full judgments delivered by Justice Albert Redhead on 17th September 2012 and Justice Vicki Ann Ellis on 22nd December 2014. I will therefore set out only so much of those proceedings necessary to appreciate what impact they might have on the issues raised by this application for the determination of the court.

[9] The Applicants were arrested on 24th August 2011 by the Royal Virgin Islands Police and charged with the offences of conspiracy to import cocaine, possession of a prohibited firearm, acquisition, possession or use of the proceeds of criminal conduct, possession of cocaine with intent to supply, and unlawful importation of cocaine. On 1st September 2011, they were served with a provisional warrant pursuant to a United States extradition request based on an indictment dated July 2011 and were committed on this first extradition request. On 17th September 2012, Justice Redhead granted a writ of habeas corpus. It will be necessary to revisit those findings of Redhead J in a more fulsome manner since they comprise a central pillar of the Applicants' case. I will hereafter refer to this judgment as Hodge and Harrigan No. 1.

[10] The Director of Public Prosecutions discontinued the domestic proceedings against the Applicants on 12th October 2012 and on that same day Governor McCleary issued an order to proceed with extradition proceedings. The Applicants applied for leave to judicially review the decision of Governor McCleary. On 22nd December 2014, Justice Ellis quashed the Governor's decision to issue the orders to proceed and remitted it to him for reconsideration in accordance with the judgment of that court. It will also be necessary to return to Ellis J's decision later in this judgment.

[11] The third extradition request was issued in May 2016 which culminated in the committal of the Applicants by Magistrate Innocent. That is the decision under challenge in these proceedings.

Is Habeas Corpus a Bar to Fresh Extradition?

[12] Mr. Fitzgerald's argument on this point can succinctly be restated as follows: (1) there is no jurisdiction in the BVI Court to entertain an appeal from an order granting habeas corpus in extradition proceedings; (2) the fact that the Applicants had won a final and un-appealable ruling in their favour in habeas corpus proceedings gave Redhead J's judgment, and their discharge by his order, a special status; (3) Redhead J's decision was based not just on procedural matters but on fundamental, substantive matters such as the Requesting State's failure to present a prima facie case and the appropriate forum being the BVI; (4) consequently, it would undermine the sacrosanct principle of finality of discharge on a criminal habeas corpus application, in all jurisdictions which provide for no prosecution appeal, to permit fresh proceedings to be initiated since this would frustrate the unconditional and final order for discharge made by Redhead J.

[13] Does the previous habeas corpus order for the release of the Applicants made by Redhead J. have the "special status" contended for by Mr. Fitzgerald and do they operate as a bar, in this jurisdiction, to the bringing of new extradition proceedings based on fresh evidence?

The Un-appealable Point

[14] In Superintendent of Prison and Attorney General v Hodge,[1] the Court of Appeal of the Eastern Caribbean States, citing Attorney General of Antigua and Barbuda v Lewis,[2] held that the court had no jurisdiction to entertain the appeal because there is no right of appeal to the court of appeal against the grant of a writ of habeas corpus by the high court under the West Indies Associated States

[1] Territory of the Virgin Islands, BVIHCVAP 2012/0034
[2] (1995) 51 WIR 95

Supreme Court (Virgin Islands) Ordinance or any other law. The court held that extradition proceedings are criminal in nature and orders on applications for habeas corpus in extradition proceedings are orders in a criminal cause or matter. Accordingly, no appeal lies to the court of appeal against such orders by virtue of section 30(2) (a) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance.

[15] The Judicial Committee of the Privy Council affirmed this position in Attorney General for Saint Christopher and Nevis v Rodionov[3] when it held that since domestic law had precluded an appeal from a high court decision on habeas corpus to the court of appeal, an appeal therefrom to the Privy Council was also precluded; and that, accordingly, the Privy Council had no jurisdiction to grant special leave to appeal or to entertain an appeal from the decision of the high court in habeas corpus proceedings.

[16] Mr. Black conceded that there was no appeal to the court of appeal against a high court decision on habeas corpus, and that the decision of Redhead J. was not appealable in that sense. He however rejected the argument that the decision of Redhead J was cloaked with some kind of special status which precluded any further attempts to extradite the Applicants. His submissions, distilled to their essence, were that: (1) if this third attempt to extradite the Applicants was based on precisely the same facts, then Redhead J's decision would be final and any such further attempt to extradite them would be precluded; (2) however this third extradition request was based on fresh evidence; a totally different set of facts; (3) the authorities which establish that a decision granting habeas corpus is final and un-appealable do not say that fresh evidence cannot lead to a new extradition request; (4) there is authority from the Supreme Court of Jamaica that fresh extradition proceedings can be brought even where a high court, on a habeas corpus application, has previously discharged a defendant detained on an earlier

[3] [2004] 1 WLR 2796

extradition request. The court must therefore carefully examine the relevant authorities in order to ascertain the scope of the principles they establish.

The Finality Point

[17] The Applicants place great weight on the Trinidadian case of **Attorney General of Trinidad and Tobago v Phillips**[4] to support their argument that an order for habeas corpus is final and therefore it would be an abuse of process to seek once again to extradite them for the same offences. In **Phillips**, the respondents ("the Muslimeen") had participated in an armed insurrection intending to overthrow the lawful Government of the Republic of Trinidad and Tobago. They seized buildings including the parliament building and took the occupants hostage. People were killed and injured and property damaged. Eventually, the Acting President of Trinidad and Tobago, pursuant to the power of pardon conferred by section 87 (1) of the Constitution of the Republic of Trinidad and Tobago, signed a pardon granting amnesty to all those involved in the insurrection. After the hostages were released and the Muslimeen had surrendered, they were arrested and charged with treason, murder and other offences. Relying on the pardon, they sought writs of habeas corpus. They also sought redress under the constitution for breach of certain fundamental rights. This was consolidated with the habeas corpus proceedings. The trial judge made an order for habeas corpus and granted a declaration that their constitutional rights had been infringed. No appeal lay to the court of appeal in relation to the habeas corpus order and the court of appeal dismissed the appeal by the Attorney General against the trial judge's decision on the constitutional motion.

[18] On appeal to the Privy Council, **Lord Woolf** made the following findings:-

> "In common law jurisdictions there exists a separate ground of protection for those who surrender in reliance on a conditional offer or promise of a pardon. The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so. It could well be an abuse of process to seek to prosecute those who have relied on an offer or promise of a pardon and

[4] [1995] 1 A.C. 396

complied with the conditions subject to which that offer or promise of a pardon was made. If there were not circumstances justifying the state in not fulfilling the terms of its offer or promise, then the courts could well intervene to prevent injustice: see *Reg. v. Milnes and Green* [1983] 33 S.A.S.R. 211.

The possibility of abuse of process arises on the facts of this case. On the findings of the judges in the courts below the Muslimeen in all the circumstances acted reasonably after the pardon was granted. On any view of the facts, as was pointed out in the judgments in the courts below, the Acting President thereafter prior to the surrender did not give any indication that the validity of the pardon was in question. On the contrary the negotiations which resulted in the ultimate surrender of the Muslimeen and the release of the hostages unharmed were conducted on the basis that they were entitled to the benefit of the pardon. However whether the facts give rise to an abuse of process would have been a question for the trial judge in the event of further criminal proceedings. Here to those facts there has to be added the very significant factor that to prosecute the Muslimeen now because of a decision of the Board that the pardon is invalid would be inconsistent with the decision of Brooks J. that they were entitled to an order of habeas corpus. That part of the decision of Brooks J. was final. It could not be subject of an appeal and it would, in the opinion of the Board, because of this, inevitably be a manifest abuse of process to circumvent the provision of the law of Trinidad and Tobago, that an order of habeas corpus is not subject of appeal, by bringing a further prosecution relying on the outcome of an appeal under the Constitution.

The result therefore of the decision of the Board is that the pardon was and is invalid. That means that it was not unlawful to initiate a prosecution of the Muslimeen in relation to the events arising out of the insurrection and to arrest them for the purposes of that prosecution. However in those proceedings the Muslimeen could well have been in a position to raise a plea in bar on the basis of abuse of process. The Board does not venture an opinion as to whether that plea would have succeeded; it would have been a decision for the court before whom the trial was to take place. However, the order of habeas corpus having been made, the Board is able to assist the Attorney-General and the Director of Public Prosecutions, as they requested, by saying that after the order of habeas corpus was made it would be an abuse of process to seek once more to prosecute the Muslimeen for the serious offences committed in the course of the insurrection.

As the prosecution was not initially unlawful the detention of the Muslimeen in connection with the prosecution was also not unlawful or contrary to the Constitution. The fact that the prosecution could be subsequently stopped either by the trial judge accepting a plea based on

> an allegation of abuse of process or, as occurred here, an order of habeas corpus being made would not affect the lawfulness of any previous detention. Accordingly the constitutional claim of the respondents should not have succeeded. Their Lordships therefore allow the appeal and set aside the declaration granted by Brooks J. to the respondents and his order for damages to be assessed. In relation to costs, the Board does not interfere with the order for costs made by Brooks J. in respect of the respondents' application for habeas corpus but directs that otherwise there should be no order for costs either before the Board or in the courts below."

[19] From those passages, I distill the following as the essential points Lord Woolf was making:

(1) The respondents had not been granted a valid pardon (for reasons explained in the judgment) and so it was not unlawful to have initiated a prosecution of them.

(2) Notwithstanding the invalidity of the pardon, the respondents could well have been in a position to raise a plea in bar on the basis of abuse of process.

(3) The possibility of abuse of process arose because the Acting President did not give any indication that the validity of the pardon was in question; the negotiations resulting in the surrender of the respondents and the release of the hostages were conducted on the basis that they were entitled to the benefit of the pardon.

(4) In any event, to prosecute the respondents now because of the Board's decision that the pardon is invalid would be inconsistent with the decision of the high court judge that they were entitled to an order of habeas corpus, which was final. It would be a manifest abuse of process to circumvent the provision of the law of Trinidad and Tobago that an order of habeas corpus is not subject of appeal, by bringing a further prosecution relying on the outcome of an appeal under the Constitution.

[20] Mr. Black invited the court to look at Phillips on its own facts which are different from the case at bar. If I understood his argument, he submitted that Lord Woolf's conclusions on the finality of habeas corpus had to be viewed in the context of the

facts of that case which involved a pardon and the possibility of abuse of process in relation to reliance on that pardon. The Applicants in this case were given no promise that their extradition would not be sought afresh and the third request was based on fresh evidence.

[21] What I interpret Lord Wolf to have been saying was that, on the facts of Phillips, the respondents could avail themselves of the abuse of process argument in two separate and distinct ways: (1) reliance on the pardon; and (2) reliance on the habeas corpus order. Indeed, he stated that: "*Here to those facts there has to be added the very significant factor that to prosecute the Muslimeen now because of a decision of the Board that the pardon is invalid would be inconsistent with the decision of Brooks J. that they were entitled to an order of habeas corpus. That part of the decision of Brooks J. was final*." (underlining supplied).

[22] I cannot see how the fact that the order of habeas corpus (made in Phillips) was bound up with the reliance on the pardon could limit the applicability of the broad principle that such an order, made on a substantive as opposed to procedural issue, is final. That Phillips involved the consolidation of constitutional proceedings for breach of fundamental rights with habeas corpus proceedings similarly does not narrow the principle.

The Fresh Evidence Point

[23] Mr. Black contended that no authority has been put before the court which states that a second extradition request cannot be brought on a new set of facts where an order for habeas corpus has previously been made on substantive grounds in relation to an earlier extradition request. The new evidence in this case included affidavits from Denise Ventura dated 8th October 2012 and Roberto Mendez-Hurtado which were not available at the previous extradition hearing.

[24] The Respondents relied on several authorities for the proposition that fresh extradition proceedings can in fact be brought after discharge by habeas corpus in previous proceedings.

[25] In re Rees,[5] Lord Mackay of Clashfern concluded as follows:

> "In my opinion once the appellant had been discharged full effect had been given to the provisions of article XII.
> These provisions do not prohibit a further attempt to secure the extradition of the person who has been liberated. They do not prevent his extradition. The decision of the police magistrate setting a person at liberty in terms of article XII is not a decision that he can never thereafter be extradited in respect of the matter which has been the subject of the requisition. Just as the decision of the examining magistrates in committal proceedings in England is not final so the decision of the police magistrate to set at liberty is not a final decision precluding thereafter a decision to commit for extradition on the basis of further evidence: see *Atkinson v United States of America Government* [1971] A.C. 197, per Lord Reid, at p. 235D.
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> ….
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> When examining magistrates in committal proceedings reach the conclusion that the evidence before them is insufficient to justify committal for trial of an accused person, the accused person is entitled to be set at liberty. This does not prevent him being re-arrested and being made subject to new committal proceedings, although, as the authorities illustrate, the initiation of new proceedings may, in some circumstances, amount to an abuse of process."

[26] I think it is a correct statement of the law that the discharge by a magistrate in committal proceedings, whose decision is never regarded as final, is different from a discharge by a high court judge on substantive grounds whose decision is final and un-appealable. Secondly, as pointed out by Mr. Fitzgerald, at the time Rees was heard, United Kingdom law had been amended to allow for appeal against a discharge on habeas corpus. The UK made this amendment in 1960. No such amendment has been made in the BVI. It will also have been observed that Lord MacKay acknowledged that the initiation of new proceedings may, in certain circumstances, amount to an abuse of process.

[5] [1986] 1 AC 937.

[27] For the same reason, the Respondents' reliance on **Auzins v Prosecutor General's Office of the Republic of Latvia**[6] appears to be misplaced. **Auzins** was a decision of the Sheriff Court which in Scotland performs a function similar to that of a committing magistrate. The discharge was not by the high court on an application for habeas corpus and there was no appeal, although there was jurisdiction to appeal, unlike the situation in the BVI.

[28] In **Kruger v Governor**,[7] the applicant and his wife had been committed to be extradited following an earlier request from the Swiss Government, but were released pursuant to writs of habeas corpus on the ground that the documentary evidence adduced in support of the charges was not properly authenticated for the purposes of complying with extradition legislation. The Swiss Government then made a second request in respect of the applicant only, on substantially the same grounds, but supported by additional evidence. The governor issued his authority to proceed with the extradition. The applicant applied to set aside the governor's decision on the ground, *inter alia*, that the Swiss Government was not entitled to attempt to secure the applicant's extradition a second time, having made an earlier request which had failed for reasons entirely within its own control.

[29] The Cayman Islands Grand Court in **Kruger** held: that the Swiss Government had made an earlier application which had failed for technical reasons was a factor which the governor might consider in exercising his discretion under the Extradition Act 1989 but was not in itself a matter which precluded the success of a second application. Smellie J. stated:

> "The basic premise of the argument that a requesting state, when once shown to be at fault, may not be afforded a second chance at extraditing a fugitive, is therefore not one which is supported by authority. As a basic premise, I am of the view that it must be wrong. Surely it must lie within the discretion of the Governor to consider what went wrong on the previous occasion or occasions and the reasons for it, before he might feel obliged to refuse a request, even if some "fault" may be ascribed to the requesting state? I therefore found that argument to be misconceived

[6] [2016] EWHC 802.
[7] [1997] CILR 73.

> and one which, standing by itself, could have had no hope of success as a ground for showing the irrationality alleged."

[30] In Kruger, the applicant was released on a purely technical and procedural ground, namely, that the documentary evidence had not been properly authenticated, in contradistinction to the instant case in which the Applicants had been discharged after a hearing on substantive grounds. Secondly, as submitted by Mr. Fitzgerald, the point as to the finality of the order and its consequences had not been taken before the Grand Court.

[31] Rees and Auzins are distinguishable from the instant case in that the former were not decisions emanating from the high court, while Kruger was a high court decision based on a technical, procedural ground and not a matter of fundamental substance. They therefore do not provide a persuasive answer to the argument that a discharge on an order of habeas corpus is final and operates a bar to the bringing of a third extradition request even if based on fresh evidence.

[32] In their post-hearing submissions, the Respondents have relied on the 2012 Jamaican Supreme Court case of Vincent Ashman v Commissioner of Correctional Services[8] in which that court held that in certain circumstances it would not be an abuse of process to initiate fresh extradition proceedings even after a fugitive had obtained discharge from an earlier extradition request by way of a writ of habeas corpus.

[33] The Supreme Court of Jamaica identified that a Requesting State has no right of appeal against a grant of habeas corpus in the jurisdiction of Jamaica. It went on to state that the Judicature (Appellate Jurisdiction) Act was silent as to whether a re-submission could be made of a previous request after a fugitive had been discharged on an application for habeas corpus. It concluded that there was no rational reason why a second request could not be made and that there was no

[8] [2012] JMSC Full 2.

basis for a "*blanket, automatic, inflexible rule*". It all depended upon the reasons for the failure of the first application.

[34] The court, per Edwards J., rejected the argument that the previous grant of habeas corpus constituted an absolute discharge:

> "[163] …His discharge is not an indication that he is not to be extradited at all for those charges or that he cannot be re-arrested under a fresh warrant and fresh extradition proceedings undertaken…
>
> [187] …Quashing a warrant is not quashing a charge … there is no legal barrier preventing the Requesting State from issuing a second request on the same charge..."

[35] That court clearly took the view that fresh extradition proceedings would not constitute an abuse where the discharge on the earlier occasion was based on the absence of properly authenticated documents or an insufficiency of evidence which was cured in a later extradition request. The writ of habeas corpus granted by Redhead J in Hodge and Harrigan No. 1 was based, partly, on insufficiency of evidence to establish a prima facie case. So, which of these two approaches should this court adopt?

[36] Mr. Fitzgerald urges this court to follow the Woolf approach in Phillips for the following reasons: (1) the court in Ashman did not have before it any argument based on the authority of Phillips, Phillips was not cited, and the principle asserted by Lord Woolf was neither referred to nor considered; (2) Ashman itself recognized that there are circumstances in which a substantive ruling on habeas corpus should be treated as final; (3) the declaration on forum in Hodge and Harrigan No. 1 was a ruling of a substantive nature since it was based on a conclusion that the Applicants had a fundamental right to be tried by their peers wherever possible.

[37] Putting aside the findings in Hodge and Harrigan No. 1 that the extradition formalities were faulty and there was no prima facie case, there was the additional finding that the BVI was the appropriate forum, and that the Applicants were

constitutionally entitled to trial by a jury of their peers where possible. I do not think it can be seriously disputed that such a finding constitutes a ruling of a substantive nature. Even on the authority of Ashman, such ruling on a habeas corpus application could be treated as final. It should be noted, *en passant*, that Ashman was a paradigm case of extradition, involving as it did a Jamaican fugitive of United Kingdom justice accused of murder.

[38] I am inclined to the Woolf approach when I consider the nature of habeas corpus and what is was historically designed to achieve. The 1923 House of Lords judgment in Secretary of State for Home Affairs v O'Brien[9] contains the following exegesis on the historical importance of habeas corpus which I find to be useful in understanding its fundamental nature:

> "It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the twenty-third year of Edward I.
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> ….
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> In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent Court, no appeal lies to any superior Court.
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> ….
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> It was established and indeed very often repeated in the learned judgments which were delivered in *Cox v Hakes* that if upon the return to the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody, and if discharge followed, the legality of such discharge could never again be brought into question. Lord Halsbury summarized the matter in the following sentence: 'It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the

[9] [1923] 2 K.B. 361.

> delay and uncertainty of ordinary legislation, so that the final determination upon that question may only be arrived at by the last Court of Appeal." (underlining supplied)

[39] While that historical position (of summary and final discharge on a writ of habeas corpus) has been reversed by express legislative amendment in 1960 in the United Kingdom, opening the door for appeals to that jurisdiction's last court of appeal, the position has remained unaltered in the BVI and indeed in other jurisdictions of the Commonwealth Caribbean. It may be that the time has come to enact similar legislative amendment in the BVI but until that is done an order of habeas corpus issuing from the high court is final and un-appealable.

[40] Furthermore, as pointed out by Mr. Cooper, the indictment on which the third extradition request is made remains unaltered. It is the same indictment that grounded the two previous extradition requests. No new offence is alleged. Indeed, this third extradition request is based entirely on the same substratum of facts. What is new is that additional evidence has been made available, primarily from Roberto Mendez-Hurtado, to fill that evidential gap which had caused Redhead J to rule that no prima facie case had been made out that the Applicants had intent and knowledge of the facts and circumstances involved in the commission of the offence. This third request cannot be considered an extradition request based on a new case or even on a new substratum of facts.

[41] I conclude on this point, appropriating the reasoning of Lord Woolf in Phillips, that it would be a manifest abuse of process to circumvent the provision of the law of the BVI – that an order of habeas corpus is final and un-appealable – by allowing this third extradition request based on the same indictment and the same offences but having been supplemented by additional evidence. This finding is enough to dispose of this application in favour of the Applicants and grant orders of habeas corpus for their release. Nevertheless, in the event that I am wrong on this point, and out of deference to the extensive arguments marshaled by counsel on the second issue, I will go on to consider the issue of whether, in all the circumstances

of this case, it would be unjust, oppressive, abusive and unconstitutional to now extradite the Applicants.

Unjust, Oppressive and Unconstitutional?

[42] The Applicants say that it would be unjust, oppressive or abusive to extradite them now to the United States. Their reasons for so averring include the following: (1) the appropriate forum for the trial of the Applicants is the BVI as was declared by Redhead J in his judgment; (2) the Applicants are citizens of the BVI; (3) the Applicants have strong family ties in the BVI and any interference with those family ties must be proportionate and necessary in the circumstances of the case; (4) the Applicants were originally charged with criminal offences against BVI law and the offences are of a distinctly BVI nature; (5) the Applicants could feasibly be prosecuted in the BVI; (6) trial in the BVI would avoid further delay in proceedings already marked by seven years of delays predominantly caused by repeated flaws in the unnecessary extradition process and alternating periods of detention and liberty which render extradition now oppressive; (7) if extradited, the Applicants' long periods of custody already served would not count towards any sentence imposed in the United States; (8) extradition would expose them to the risk of disproportionate, cruel and inhuman sentence of life without parole for drug offences; (9) extradition would expose them to the unjust pressure to plead guilty that is inherent in the United States system particularly in the case of drug offences; (10) exposure to the real risk of discriminatory treatment in prosecution and sentencing on grounds of race and ethnicity.

[43] The Applicants also say that there is a constitutional dimension to this ground in that the extradition of a citizen to a foreign state engages their fundamental constitutional rights which should only be curtailed if it is reasonable and proportionate to do so in the public interest.

[44] Before turning to the arguments on this issue, I think it can be shortly stated, since it was not in dispute between the parties, that **Fuller v Attorney General**[10] is good authority for the proposition that the court and not the executive has the jurisdiction to refuse extradition on the grounds of injustice or oppression. In **Fuller**, Lord Phillips stated at paragraph 51: -

> " [51] For the reasons given by the Administrative Court in *Kashamu*, the approach in the *Atkinson* line of authority cannot be applied in a state that has a Constitution on the Westminster model so as to confer on the executive rather than the courts the determination of any issue that goes to the legitimacy of extradition or of detention pending possible extradition.
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> ….
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> [53] The abuse of process argument goes to the legality of the extradition proceedings. Abuse of process is a paradigm example of a matter that is for the court and not for the executive. For these reasons the Board has concluded that the appellant has made out his case that the Supreme Court has jurisdiction to consider the issue of abuse of process."

[45] Mr. Black pointed out that **Fuller** identified three types of conduct that could potentially fall within the term "abuse of process", namely:

(1) Making use of the process of the court in a manner which is improper such as adducing false evidence or indulging in inordinate delay;

(2) Using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law;

(3) Using the process of the court for an improper motive or purpose, such as to extradite a defendant for a political motive.

[46] In **Fuller**, the type of conduct which the Privy Council found as constituting an abuse of process was inordinate delay. In the instant case, I do not understand the Applicants to be averring that the Respondents' conduct fell into any of those three categories. Rather, they are relying on Lord Phillips' statement in **Fuller** that

[10] [2012] 2 LRC 110.

the "*circumstances [in which the court] can, or should, accede to a habeas corpus application on the ground that extradition would be so unjust or oppressive as to be unlawful … might extend further than those that can naturally be described as amounting to an abuse of proces*."

[47] There is also Lord Woolf's statement in **Phillips** that "*The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so*."

[48] In **Ferguson and Galbaransingh v Attorney General of Trinidad and Tobago**,[11] Boodoosingh J, at paragraph 166 of his judgment, declared that it would be unjust, oppressive and unlawful to order the extradition of the claimants in circumstances where the claimants were citizens of Trinidad and Tobago, had been involved in criminal proceedings before the local courts for about ten years and enjoyed the constitutional protection of the fundamental rights guaranteed to all citizens of that republic.

[49] My approach therefore will not be to consider whether all the circumstances relied upon by the Applicants constitute an abuse of process. It will be to consider, in the round, all those circumstances to see whether they are so overwhelming that the court is obliged to make a finding that to extradite them now would be unjust or oppressive, in the wider sense contemplated by Lord Phillips in **Fuller**.

The Forum Point

[50] The Applicants contend that Redhead J. effectively ruled that the United States was not the appropriate forum for the trial of the Applicants. The Respondents' reply is that: (1) at no time has there been any judicial determination that the US is an "inappropriate foreign forum"; (2) applying the reasoning in **United States v Cotroni**[12] to the case as now presented, the BVI is not the "far more appropriate

[11] The Republic of Trinidad and Tobago, CV 2010-04144
[12] [1989] 1 SCR 1469

forum", as averred by the Applicants, for the trial of the alleged offences; and (3) the declaration of Redhead J. that the BVI was the appropriate forum can only stand as a declaratory judgment in those proceedings; the instant proceedings are not the same set of proceedings.

[51] We therefore now return to the judgment of Justice Redhead to assess the scope and effect of his findings. The relevant findings were as follows:-

> "[99] Finally I now turn to the question of oppression. The Applicants argue that it is oppressive of the requesting state to ask for their extradition to United States to be tried for these offences. The applicants argue that they are before the court in the BVI for the same offences which began before the US stepped in to have them extradited to stand trial on virtually the same offences.
>
> ….
>
> [102] I agree with the submission for Mr. Fitzgerald Q.C. that the court should decide this because it goes to the legality of detention. And of course BVI has a written constitution. I also agree with his argument that it would not be right nor consistent with the principle of separation of powers to postpone consideration of the constitutionality of extradition to a later stage or leave it to the executive rather than the Courts. (See Greene Browne v R[26])
>
> ....
>
> [109] In my opinion, Section 6 of the BVI constitution finds expression in Article 6 of the European Convention. Section 6 (1) of the BVI constitution mandates as follows:
>
> > "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."
>
> [110] Mr. Fitzgerald Q.C. refers to the case Rhett Fuller v The Attorney General of Belize[36] and argues that the Privy Council held that this abuse jurisdiction existed in the High Court hearing a habeas corpus application in extradition proceedings under the 1870 Extradition Act. He contends that, by parity of reasoning, such an abuse jurisdiction necessarily exists and applies to these proceedings under Schedule 1 of the 1989 Act (which substantially re-enacts the 1870 Extradition Act). The matter is put beyond doubt by the fact that the constitution guarantees

protection from arbitrary detention and guarantees the protection of the law. It is from these fundamental rights that the abuse jurisdiction is derived. It is the courts, and not the executive, that must exercise the abuse jurisdiction in a constitutional regime founded on the rule of law and the separation of powers.

[111] I agree entirely with this submission of Mr. Fitzgerald Q.C.

[112] In addition in my view, the defendants would be entitled to jury trial (see Section 16 (1) (g) of the BVI Constitution), trial by their peers. In my opinion, one is entitled to that right whenever that is possible. To extradite the defendants to stand trial in a foreign jurisdiction will deprive them of that right.

[113] Finally, in Birmingham (supra) the English High Court establishes that a person's Article 8 rights to family life are engaged by potential extradition, insofar as extradition constitutes a breach of the defendants' right to private and family life. Mr. Fitzgerald Q.C. contends that Article 8 of the European Convention has a direct parallel to section 19 of the BVI Constitution, which says in part:

> "Every person has a right to respect for his or her private and family life, his or her home and his or her correspondence including business and professional communications."

….

[117] In conclusion, I hold, among other things, that the order by the Learned Magistrate to extradite the applicants was null and void as it was based on an invalid authority and in addition to the reasons given above. The order of the Learned Magistrate to extradite the Applicants to the United States of America is quashed.

[118] It is hereby declared that the appropriate forum to try the Applicants for the alleged drug offences is the British Virgin Islands."

[52] It appears that Redhead J came to the conclusion that the appropriate forum for the trial of the alleged drug offences was the BVI after finding that the Applicants – as citizen (in the case of Hodge) and belonger (in the case of Harrigan) – were entitled to a trial by jury of their peers. His declaration that the BVI was the appropriate forum to try the Applicants was made in circumstances where there

were two competing jurisdictions for the trial of the Applicants, namely the BVI and the United States.

[53] The corollary of his declaration that BVI is the appropriate forum is that the United States is not the appropriate forum for the trial of the Applicants. That forum issue has therefore been litigated and decided upon by Redhead J in Hodge and Harrigan No. 1 and has not and cannot be appealed. To allow the Respondents to re-litigate this issue, in circumstances where there can be no appeal, would undermine the effect of that ruling and be abusive, unjust and oppressive.

[54] Mr. Black submitted that, in Phillips, while the Privy Council held that a writ of habeas corpus was final and could not be the subject of an appeal, it had no difficulty reversing the declaratory judgment in respect of the validity of the pardon. This meant, he contended, that there is nothing to prevent a court overturning Redhead's J's declaratory ruling that the BVI was the appropriate forum to try the Applicants. Further, he submitted that were also fresh submissions in relation to forum, in a landscape where there had been discontinuance of domestic proceedings.

[55] The difficulty with that argument is that Redhead J's judgment was given in a habeas corpus application which in the BVI is un-appealable. Unlike the case in Phillips in which the habeas corpus application was consolidated with a constitutional motion which made it possible to appeal against the findings in the constitutional proceedings, these proceedings were not consolidated with any other proceedings so that there is no possibility of appealing any aspect of Redhead J's judgment. I am unable to see how this court, being a court of coordinate jurisdiction, could revisit the issue of forum, even with fresh evidence and the discontinuance of domestic proceedings, while Redhead J's declaration on forum is extant and un-appealable.

[56] The Respondents also rely on the judgment of Ellis J., given after Redhead J's declaration on forum, that the order to proceed with the fresh extradition request was not an abuse of process. Justice Ellis indeed made that finding. That finding however related to a challenge in judicial review proceedings to the governor's issue of an order to proceed. The learned judge was not prepared to rule, at that stage, that such an order to proceed constituted an abuse of process. I accept that by stating that "*this court is of the view that at the stage when these proceedings were brought it would be erroneous for the court to draw such a definitive conclusion*", Ellis J anticipated a fuller consideration later in the judicial process. That later stage is the current proceedings before this court following the committal hearing.

Forum and "the Cotroni Factors"

[57] The starting point in deciding the issue of appropriate forum, where there is a conflict between the competing claims of a domestic prosecution and extradition proceedings, is widely acknowledged to be a consideration of the so-called Cotroni factors or criteria as enumerated in The United States v Cotroni. In the instant case, however, the Cotroni factors necessarily feature less prominently given Redhead J's un-appealable declaration on the appropriate forum and the consequence of that declaration. In any event, arguments were put before Redhead in Hodge v Harrigan No. 1 by counsel for the Applicants that the application of the Cotroni factors favored the trial of the Applicants in the BVI. Redhead J did not expressly state that his assessment of the Cotroni factors favoured a finding that the appropriate forum was the BVI. He did ultimately make a declaration that the BVI was the appropriate forum.

[58] The Cotroni factors may be summarized as follows:-

(1) Where was the impact of the offence felt or likely to be felt?

(2) Which jurisdiction has the greater interest in prosecuting the offence?

(3) Which police force played a major role in the development of the case?

(4) Which jurisdiction has laid charges?

(5) Which jurisdiction has the most comprehensive case?

(6) Which jurisdiction is ready to proceed to trial?

(7) Where is the evidence located?

(8) Is the evidence mobile?

(9) The number of accused involved and whether they can be gathered together in one place for trial.

(10) In which jurisdiction were most of the acts in furtherance of the crime committed?

(11) The nationality and residence of the accused.

(12) The severity of sentence the accused is likely to receive in each jurisdiction.

[59] The Respondents say that the bulk of the drugs and money ended up in Puerto Rico and the United States. While that may be true, the impact of a lesser amount of drugs and drug-money can be overwhelming in tiny nation states like the BVI. The allegation of how Roberto Harrigan abused his office as a customs officer to facilitate international drug dealing, if true, bears eloquent testimony to how drug-dealing in small island states can reach deep inside law enforcement agencies and corrupt them. Indeed it may well be that the impact of the offences had a more seismic effect in the BVI with its population of 30,000 people than it did in the United States.

[60] It follows from what is set out immediately above that both jurisdictions have a great interest in prosecuting the offences. I make no finding as to which state might have the greater interest.

[61] From the evidence, it appears that the law enforcement agencies of both countries collaborated in the development of the case. I am unable to conclude, on the evidence before this court, which police force had the major role in the development of the case.

[62] It is not in dispute that charges were laid first in the BVI and then in the United States but criminal proceedings were discontinued in the BVI apparently to facilitate the extradition request of the United States.

[63] It is difficult to say which jurisdiction has the more comprehensive case. What can be said is that Letty Hodge, the wife of Earl Hodge, was successfully prosecuted in the BVI for her role in the conspiracy. Equally, Mendez-Hurtado and Alvaro Nino-Bonilla, co-conspirators with Hodge and Harrigan, were successfully prosecuted in the United States.

[64] The United States is clearly ready to proceed to trial. The BVI had instituted proceedings but withdrew them as previously stated. There are no pending criminal proceedings against the Applicants here in the BVI.

[65] Evidence is located in both jurisdictions but the crucial evidence of Mendez-Hurtado can only be given in or from the United States where he is incarcerated. This evidence can be considered "mobile" since the evidence of Mendez-Hurtado was received in court via video-link in the trial and conviction of Letty Hodge in the BVI.

[66] It is not in dispute that the accused are two in number and can be easily gathered together in one place for trial in the BVI.

[67] Most of the acts in furtherance of the crime appear to have been committed in the BVI and its territorial waters.

[68] It is not in dispute that the Applicants are citizen and belonger of the BVI, respectively.

[69] The Applicants are likely to receive a more severe sentence in the United States than in the BVI as is shown later in the judgment.

[70] Having applied the Cotroni factors, it seems to me that certainly the weightier factors such as citizenship, severity of sentence, the BVI nature of the offences, and the great impact of the offences in the BVI point to the BVI being the more appropriate forum for the trial of the alleged offences.

The Citizenship Point

[71] Mr. Black submitted, firstly, that there is no general principle that a citizen should be tried in his home territory when the criminal conduct alleged is transnational in its reach; and, secondly, the fact that the conduct of an applicant took place in his home country is just one factor to be taken into consideration.

[72] He relied on this statement from Laws LJ in R (Bermingham and others) v Director of the Serious Fraud Office:[13]

> "I do not accept Mr. Hardy's submission that the possibility of a trial in the UK is legally irrelevant in a case like this. There might be an instance in which such a possibility could tip the balance of a judgment in favour of a conclusion that the defendant's extradition would amount to a disproportionate interference with his article 8 right."

[73] He also relied on the following statement from LaForest J in United States v Cotroni:[14]

> "…I see nothing irrational in surrendering criminals to another country, even where they could be prosecuted for the same acts in Canada
>
> …
>
> I do not think that the free and democratic society that is Canada any more than any other modern society today should today confine itself to parochial and nationalistic concepts of community
>
> ….
>
> The respondents were undoubtedly physically present in Canada when, as it is alleged, they participated in the acts in respect of which they are

[13] [2006] EWHC 200 (Admin)
[14] [1989] 1 SCR 1469

> charged with the relevant offences. But the transactions in which they are alleged to have been engaged in were transnational in nature… As such, the United States, as well as Canada, could properly exercise jurisdiction in respect of the alleged offences …the territoriality of wrongdoing is no longer the determining factor for criminal jurisdiction."

[74] Mr. Fitzgerald contended that there is an emerging constitutional principle that a citizen accused of transnational crime should, wherever possible and proportionate, be tried in his own jurisdiction. This emerging trend, he submitted, could be gleaned from cases such as Ferguson, Hodge and Harrigan No. 1, Bermingham, and Lauri Love v The Government of the United States of America and Liberty.[15]

[75] In Hodge v Harrigan No. 1, Justice Redhead had indeed stated that to extradite the defendants to stand trial in a foreign jurisdiction would deprive them of the right to trial by their peers which is a right that a citizen is entitled to wherever possible. The learned judge did not develop the point beyond this brief statement and I would be cautious in treating it as a general principle in the sense advocated for by the Applicants.

[76] Justice Boodoosingh in his judgment in Ferguson stated:

> "Nationality and Residence of the Accused
> 93. Both claimants are nationals of Trinidad and Tobago. They live here. Their families are here. Their work is here. They are currently being prosecuted here. For much of the time they have been prosecuted they have been confined to remain in Trinidad and Tobago either on bail or in custody. They have been awaiting indictment for the Piarco 1 charges for some considerable time. Given that proceedings have been going on against them for almost 10 years here, this factor ought to have weighed significantly on the decision."

[77] It appears to me that though citizenship was a significant factor in Ferguson, the greater weight seemed to have been placed by Boodoosingh J on the fact that proceedings had been underway against the claimants for about ten years, as well

[15] [2018] EWHC 172.

as the fact that they were involved in a comprehensive conspiracy of defrauding the government. These appeared to me to have been the factors that tipped the scale against extradition, and not the fact of the claimants' citizenship of Trinidad and Tobago. The learned trial judge cited proceedings "over hundreds of court days" and the unfairness and oppression of suddenly abandoning those proceedings.

[78] On the other hand, Boodoosingh at paragraph 101 of his judgment made reference to the remarks of Kangaloo JA (in an earlier appeal of an aspect of the case) that indeed seems to strike the citizenship chord:-

> "We cannot be seen as shirking our responsibility to our society to ensure that justice is obtained locally, by circumventing our difficulties in the administration of justice, by the extradition of the appellants. Even more so when many developed countries flatly refuse to extradite their own citizens under any circumstances regardless of the consequences which may follow." (underlining supplied)

[79] In **Bermingham**, Laws J stated:-

> "118 …If a person's proposed extradition for a serious offence will separate him from his family, article 8 (1) is likely to be engaged on the ground that his family life will be interfered with. The question then will be whether the extradition is nevertheless justified pursuant to article 8(2). Assuming compliance with all the relevant requirements of domestic law the issue is likely to be one of proportionality: is the interference with family life proportionate to the legitimate aim of the proposed extradition? Now, there is a strong public interest in "honoring extradition treaties made with other states" (the Ullah case [2004] 2 AC 323, para 24). It rests in the value of international cooperation pursuant to formal agreed arrangements entered into between sovereign states for the promotion of the administration of criminal justice. Where a proposed extradition is properly constituted according to the domestic law of the sending state and the relevant bilateral treaty, and its execution is resisted on article 8 grounds, a wholly exceptional case would in my judgment have to be shown to justify a finding that the extradition would on the particular facts be disproportionate to its legitimate aim.
>
> …

> 120 The second, albeit lesser, factor is that the defendants are of course United Kingdom nationals; but the paradigm extradition case is where the fugitive is a national of the requesting state, having fled its borders. The UK is one of the few European states prepared to extradite its own nationals." (underlining supplied)

[80] The instant case is clearly not the paradigm case in that the Applicants are a BVI national and a belonger and are not fugitives from the United States.

[81] In Lauri Love the court stated:-

> "22. In our judgment, section 83A is clearly intended to provide a safeguard for requested persons, not distinctly to be found in any of the other bars to extradition or grounds for discharge, including section 87 and the wide scope of article 8 ECHR. The safeguard is not confined to British nationals, but it is to be borne in mind that the United Kingdom is one of those countries which is prepared to extradite its own nationals. Its underlying aim is to prevent extradition where the offences can be fairly and effectively tried here, and it is not in the interest of justice that the requested person would be extradited." (underlining supplied)

[82] The Applicants readily concede that the forum bar introduced by the UK legislature to meet concerns about the inappropriate extradition of citizens to jurisdictions such as the United States is not applicable in the instant case. They nevertheless urge this court to consider the values and principles that underpin the forum bar as a means of informing the court's development of constitutional principles. I accept that constitutional principles are naturally subject to evolution and development that take account of society's evolving norms of decency and humanity.

[83] Having reviewed Ferguson, Bermingham, Lauri Love and Hodge and Harrigan No. 1, I am not persuaded that, taken together, there is as yet "critical mass" to find that there is an emerging constitutional principle that a citizen accused of transnational crime should, wherever possible and proportionate, be tried in his own jurisdiction. Each of those cases involved other significant factors. Ferguson involved some ten years of domestic local proceedings and the fact that the treasury of Trinidad and Tobago had been heavily defrauded. Lauri Love involved

a patently disproportionate interference with family life. In Hodge and Harrigan No. 1 domestic criminal proceedings were still pending and had not yet been discontinued.

[84] What is clearly established however is that where the extradition of a citizen is sought for a transnational crime and there are significant factors, apart from his citizenship, that militate for his trial domestically, the courts have not shied away from ruling that it would be unjust for that person to be extradited. Clearly such a ruling could not be made unless the accused could be effectively tried domestically. This is a crucial consideration to which we shall return.

Constitutional Dimension: The Family life Point

[85] Ferguson and the English Supreme Court decision of Halligen v Secretary of State for the Home Department[16] are good authority for the proposition that the extradition of a citizen to a foreign state engages his constitutional rights. Bermingham establishes that a person's Article 8 rights to family life are engaged by their potential extradition and the question of forum may be relevant to the proportionality of extradition insofar as extradition constitutes a breach of the Defendant's right to private and family life. The Respondents did not dispute this. They contend that the Applicants' constitutional rights could be curtailed where there was a "constant and weighty" public interest in their extradition as in the instant case.

[86] Section 19 of the Virgin Islands Constitution grounds the Applicants' claim for the protection of private and family life. It provides as follows:-

> "Protection of private and family life and privacy of home and other property
>
> 19 (1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.

[16] [2012] EWHC 3769 (Admin)

(2) Except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

…"

[87] In Ferguson, Justice Boodoosingh stated:

> "Extradition matters have far reaching consequences as pointed out by Kangaloo J.A. in the constitutional motion brought by the claimants against the Attorney General in CV 2008-00639, Civil Appeal 2010-185 at paragraph 37 of the court's judgment, when he said:
>
> > 'It is axiomatic that extradition represents a serious interference with personal liberty as it involves a person being taken from this country and returned to a foreign jurisdiction to face criminal prosecution or to serve a term of imprisonment. It is not in dispute that the right to life, liberty and security would automatically be triggered when a person's extradition to a foreign jurisdiction is proposed.'"

[88] The Applicants' rights to personal liberty, freedom of movement and protection of family life are clearly all engaged by the proposed extradition. The question I have to decide is whether, given these constitutional safeguards, it is reasonable and proportionate to extradite them in all the circumstances of this case.

[89] As it relates to protection of family life, the court in Lauri Love stated:-

> "42. There are two areas where we find ourselves in respectful disagreement with the judge on her analysis of the factors which determine where the interests of justice lie in the forum bar: (a) the prospect that Mr. Love would be unfit to plead, and (b) the significance of the absence of a prosecutor's view. By themselves, they would not have persuaded us that she was wrong in the conclusion that she reached. But additionally, in our view she significantly underplayed the weight that should be attached to her conclusion that the prosecution could realistically proceed in the United Kingdom, albeit rather less conveniently for the prosecution. The location where the harm occurred was rightly given very great weight, as too were the interest of the victims, subject to what we have said about fitness to plead.

> 43. What persuades us that, in those circumstances, her decision was wrong is the nature of Mr. Love's connection to the United Kingdom. By itself, the fact that he is a British national, long resident here, with a girlfriend, and engaged in studies, would not have persuaded us that the decision was wrong. But here there is particular strength in the connection to his family and home circumstances provided by the nature of his medical conditions and the care and treatment they need. This is not just or even primarily the medical treatment he receives, but the stability and care which his parents provide. That could not be provided abroad. His entire well being is bound up with the presence of his parents. This may now have been enhanced by the support of his girlfriend. The significance of the breaking of those connections, as we come to next, demonstrates their significance." (underlining supplied)

[90] The Applicants both have children and family connections in the BVI. But no special circumstances have been advanced, as in the case of Lauri Love for example, as to why it would be unreasonable and disproportionate to break that family connection to honor extradition treaty obligations. As was said in Lauri Love, "*By itself, the fact that he is a British national, long resident here, with a girlfriend, and engaged in studies, would not have persuaded us that the decision was wrong*." I am therefore not persuaded that there is any particular strength in the Applicants connection to their respective families in the BVI that would make it unreasonable, disproportionate or unjust to break that family connection in the public interest that extradition treaty obligations should be honored. That they have family connections is certainly a factor to be considered but will not be given any special weight.

"Offences of BVI Nature" Point

[91] As this court has already noted above during consideration of the Cotroni criteria, the Applicants were investigated by the BVI police in 2010 and 2011 and originally charged with criminal offences against the BVI law. Letty Hodge was successfully prosecuted in the BVI. The offences are of a distinctly BVI nature.

The 'Availability of BVI Trial' Point

[92] The Applicants can properly and effectively be tried in the BVI. The clearest evidence of this is the fact that Mr. Hodge' wife, Letty Hodge, was prosecuted, convicted and sentenced in the BVI for her participation in the same conspiracy for which the Applicants' extradition is sought. At her trial, Roberto Mendez-Hurtado gave evidence against her and was cross-examined. No argument has been advanced as to why the same arrangements could not be put in place for the prosecution of the Applicants in the BVI. The Applicants had in fact been originally charged in the BVI. Their domestic criminal proceedings were discontinued on 12th October 2012 after a fresh extradition request had been received. It has not been suggested that the discontinuance was as a result of any lack of capacity or arrangements to effectively prosecute the trial.

[93] An troubling question has arisen as to whether, if the Applicants are discharged from their committal for extradition to the United States, domestic criminal proceedings could be revived against them since the Director of Public Prosecutions entered a *nolle prosequi*. Mr. Black did not deny that criminal proceedings could be re-instated after a nolle prosequi. His argument was, firstly, that it was extremely unusual to lift a nolle prosequi and, secondly, any such decision to re-prosecute could be subject of review on the basis of abuse of process. Naturally, the prospect of impunity for the Applicants is one that excites acute anxiety given the nature of the allegations against the Applicants and the great public interest in their being made to answer to these very serious charges.

[94] In Blackstone Criminal Practice 2007 at para D2.55 the case of *Ridpath* (1713 10 Mod 752) is cited as authority for the principle that an accused may be re-indicted for the same matter notwithstanding an earlier nolle prosequi. The editors make the point that such an event is unlikely to occur in practice, which is the point made by Mr. Black. The Applicants though charged in the BVI were never indicted. I have no doubt that, given the huge national interest the case has attracted and the gravity of the offences alleged, the state would be duty bound to

indict the Applicants notwithstanding that it is unusual to re-institute proceedings after a nolle prosequi.

[95] In Khan v Singh,[17] the Court of Appeal of Guyana concluded:-

> "There is no doubt, however, that in British Guiana an entry of a nolle prosequi by the Attorney General does not operate as a bar to any subsequent proceedings against an accused person on the same facts …"

[96] Finally, the United Kingdom Crown Prosecution Service website states, in relation to Nolle Prosequi:-

> "A Nolle Prosequi stops the case and is an indefinite adjournment not an acquittal. This terminates the proceedings, but it does not operate as a bar or discharge or an acquittal on the merits (so the defendant can be indicted again)."

[97] I am therefore satisfied that criminal proceedings could be re-instituted against the Applicants here in the BVI. But that is not an end of the matter. Could such a revival of domestic criminal proceedings be successfully challenged on abuse of process grounds?

[98] Like Jacob wrestling with the angel all through the night, the possibility of impunity for the Applicants has occasioned this Court considerable deliberation. In the end, I am resolved however that an abuse of process argument would not be tenable on a re-prosecution. Firstly, if the law is that criminal proceedings can in fact be re-instituted for the same offences following a nolle prosequi, it is difficult to see how an abuse of process argument could succeed.

[99] Secondly, both counsel for the Applicants, respectively, informed the court that both Applicants wished to be tried in the BVI. Indeed in an affidavit filed by Mr. Harrigan he deposed that:

> "I also wish to confirm that I have no objection to standing trial in the Territory for the local charges which have been laid against me and say

[17] (1960) 2 WIR 441.

further that my extradition is likely to breach my rights and freedoms as guaranteed by the Constitution."

[100] Thirdly, the spectre of impunity has been exorcised by both Mr. Fitzgerald and Mr. Cooper separately giving undertakings to this court, after consulting with their respective clients, that neither Mr. Hodge nor Mr. Harrigan will take the point that it is abusive or oppressive if criminal proceedings are re-instituted against them in this jurisdiction for the offences alleged.

The Delay Point

[101] The Applicants say that trial here in the BVI would avoid further delay in the already much delayed prosecution of these matters occasioned by repeated flaws in the unnecessary extradition process. They say that the extradition process has exposed them to uncertainty and long periods of remand alternating with significant periods of liberty. I think there is considerable force in the submission that alternating periods of remand and liberty over the past seven years due to faulty extradition requests, when the Applicants could have been tried in the BVI, render extradition now oppressive. When the Court reminds itself that there is the constitutional dimension of the fundamental rights and freedoms engaged by the extradition request, and the Redhead J declaration on forum, the argument becomes compelling.

"*Credit for Long Periods of Custody" Point*

[102] I have carefully read and compared the conflicting affidavits of Rebecca Schaeffer and Richard Gregorie on the question of whether the Applicants, if extradited to the United States, would be credited for any time spent in custody here in the BVI. Ms. Schaeffer does not deny Mr. Gregorie's assertion that the United States Bureau of Prisons is responsible to compute the credit to which the Applicants would be entitled (if extradited) for time in pre-trial detention. She counters however that US courts have interpreted that discretion vested in the Bureau of Prisons to deny credit for time spent in detention abroad pending extradition to the US where the detention was concurrently being credited in relation to a proceeding

prosecuted by the non-US legal authority. Undoubtedly, some of the time spent by the Applicants in custody was in relation to domestic charges prior to the discontinuance of domestic proceedings.

[103] Both Ms. Schaeffer and Mr. Gregorie cited United States statutes and United States case law in support of their respective assertions. I am unable to resolve the question of what is the correct interpretation to be given to that power of the US Bureau of Prisons, or to reach any conclusion as to any emergent pattern as to how that Bureau has exercised its power in relation to crediting defendants with time spent in non-US custody. This would involve a detailed and critical examination of United States law which this court is not equipped to undertake. On the evidence before me, it appears that there is the possibility that, if extradited to the US, the Applicants may not be credited for some of the time spent in custody here in the BVI. I put it no higher than that.

Disproportionate Sentences Point

[104] The Applicants contend that: (1) if they are convicted in the United States they are likely to face sentences as high as 30 years and would not be sentenced in accordance with the sentencing system of the BVI since the maximum likely sentence in the BVI is one of between 10 and 15 years; (2) there is a real risk of a sentence of life imprisonment without parole; (3) the plea bargaining system in the United States is likely to expose them to a very real risk that they will be pressured into pleading guilty to avoid an excessively harsh sentence; (4) the conditions of confinement may be inhuman; (5) the US prosecutor is able to withhold his determinative support for repatriation for the Applicants to serve their sentence in the BVI if the Applicants exercise their right to a trial and refuse to accept a plea deal. From the outset, I make the finding that the Applicants have not evidentially satisfied this court as to their averments at (4) and (5) under this head of complaint.

[105] The Respondents, in answer to the affirmation of Ms. Schaeffer, relied on the affidavit and post-trial supplemental affidavit of Richard Gregorie, an expert in the criminal laws and procedures of the United States, particularly in the area of law relating to violations of the federal narcotics statutes. Mr. Gregorie deposed that the Applicants would be entitled to: a bail hearing; a speedy trial pursuant to the Speedy Trial Act, Title 18, United States Code, Section 3161 et seq; their own counsel and if they could not afford counsel, to court-appointed counsel free of charge; and to choose, assisted by their counsel, whether to take part in plea negotiations. He also deposed that the statutes under which the Applicants are charged do not authorize the death penalty and therefore its imposition would be impossible in this case.

[106] If the Applicants are extradited to the United States, I am satisfied that, ultimately, it would be their choice as to whether they enter into and accept the terms of any plea negotiations. I am also satisfied based on Mr. Gregorie's affidavits that no new charges could be brought now for any conspiracy or any other narcotics offence committed during the period of the US indictment or for any crimes committed before 27th April 2013. I am satisfied that the imposition of the death penalty would be impossible in this case. Further, I am persuaded by Mr. Gregorie's evidence that it is very unlikely that the doctrine of specialty would be breached by the United States resulting in the prosecution of the Applicants for offences other the extraditable offences in respect of which their extradition is sought.

[107] Ms. Schaeffer does not challenge Mr. Gregorie's assertion about doctrine of specialty. Her evidence is that there is United States case law that a superseding indictment that does not materially alter the substance of the offence for which a defendant is extradited does not violate the doctrine of specialty. She extrapolates that the Applicants are therefore at risk of potential, post-extradition superseding indictments that allege additional, aggravating facts (such as quantity of drugs or years of the conspiracy) which may be used to increase their sentence. This she

contends would not, in the eyes of the Southern District of Florida Court and the US 11th Circuit violate the doctrine of specialty. But no evidence has been put forward to move this from the realm of speculation to some degree of likelihood. While I am perhaps able to accept the possibility of a superseding indictment alleging an increased quantity of drugs I feel wholly unable to conclude that such a risk has been evidentially established.

[108] In response to the assertion that the Applicants are likely to receive longer sentences if extradited to the United States, Mr. Gregorie pointed out in his supplemental affidavit that the two other major defendants and co-conspirators, Mendez-Hurtado and Alvaro Nino-Bonilla, received 228 months and 68 months, respectively. He did not aver that this would be the likely sentence imposed on the Applicants if extradited to the United States but stated that sentencing depended on evidence proven to a jury, admitted to by a defendant and other relevant factors considered by the sentencing judge. He also stated that Nino-Bonilla (apparently the kingpin of the operation) received 68 months "*as a result of his substantial cooperation in this and other significant cases*."

[109] The Applicants rightly point out that the sentences imposed on Mendez-Hurtado and Nino-Bonilla were as a result of their substantial cooperation and in no way provide a ceiling for the sentence that could well be imposed on the Applicants if they contest their guilt at trial having fought extradition. Mr. Gregorie's affidavit did not say anything to blunt the force of Ms. Shaeffer's evidence that many federal prosecutors strong-arm defendants by offering them shorter prison terms if they plead guilty and threatening them if they go to trial with sentences that are excessively severe, leading to situation in which few federal defendants are actually able to exercise their right to a fair trial.

[110] It is significant that Mr. Gregorie did not attempt to dispute that the Applicants could receive life sentences without the possibility of parole. In Trabelsi v

Belgium,[18] the European court held that extradition to face a real risk of a sentence of life imprisonment without parole under the federal system in the US would violate Article 3 of the European Convention because there is no proper system of review of the life sentence in the United States under the federal system.

[111] In Trabelsi, the court held that:

> "In *Vinter and Others*, cited above, the Court re-examined the problem of how to determine whether, in a given case, a life sentence could be regarded as reducible… With reference to a principle already set out in the *Kafkaris* judgment, the Court pointed out that if a life sentence was to be regarded as reducible, it should be subject to a review which allowed the domestic authorities to consider whether any changes in the life prisoner were so significant, and such progress towards rehabilitation had been made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds. Furthermore, the Court explained for the first time that a whole-life prisoner was entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence would take place or could be sought. Consequently, where domestic law did not provide any mechanism or possibility for review of a whole-life sentence, the incompatibility with Article 3 on this ground already arose at the moment of the imposition of the whole-life sentence and not at a later stage of incarceration."

[112] Applying those principles to the federal system of presidential pardon in the US, the court in Trabelsi concluded that:

> "none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognizance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds."

[113] The Privy Council in the case of Lendore v Attorney General[19] applied the Trabelsi principles to Trinidad and Tobago when it held that:

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[18] [2014] 16 EHRR 21
[19] [2017] UKPC 25

> "The underlying principle of the Strasbourg cases may readily be accepted as applicable in Trinidad and Tobago. It is that, however grave the crime, to imprison someone without any prospect of ever being released, no matter what change of circumstances there may be, is punishment which is cruel and unusual and accordingly a breach of section 5(2) (b) of the Constitution. Therefore, secondly, any such sentence must offer, in some form or another, the possibility of release. That in turn must mean, thirdly, that there must exist a system of review, for without it the prospect of release would me a matter merely of chance. And fourthly, if the decision to release or to continue to hold is not to be simply arbitrary, it must be based upon either pure mercy, or an assessment of whether continued detention is justified on legitimate grounds or not. Lord Bingham was recognizing the same principles when, in *R v Lichniak* [2002] UKHL 47; [2003] 1 AC 903 at para 8, he observed in passing that release cannot be left to chance of whether the Executive of its own initiative elects to decide simply that the public interest now favours release over detention."

[114] The reducibility principle was expressly recognized and adopted by the Caribbean Court of Justice in the 2018 case of Gregory August v The Queen:[20]

> "The constitutional provisions relating to the protection of the law and the freedom from inhuman treatment, require the existence of a mechanism which supports the reducibility of the life sentence. Reducibility speaks to a mechanism which affords an offender serving a life sentence the "'possibility' or 'hope' or 'prospect' of release". This is the purpose of the PA. It was enacted to improve the parole system in general to regulate the possible release of all prisoners, including those serving life sentences for murder."

[115] Section 13 of the BVI Constitution is in identical terms to Article 3 of the European Convention. On the evidence placed before this Court, I conclude that if the Applicants are extradited to the United States, they would face the real risk of a sentence of life without the possibility of parole. I therefore conclude that extradition to face the real risk of a sentence of life without parole in the federal system in the United States constitutes inhuman treatment or punishment contrary to section 13. It is a factor to be given considerable weight.

[20] [2018] CCJ (AJ)

The Race Factor

[116] The Applicants relied on a report of the United States Sentencing Commission entitled "Demographic Differences in Sentencing: An Update to the 2012 *Booker* Report". This commission is a bi-partisan independent agency located in the judicial branch of the United States Government. The report concluded that "*After controlling for a wide variety of sentencing factors, the Commission found that Black male offenders continued to receive longer sentences than similarly situated White male offenders, and that female offenders of all races received shorter sentences than White male offenders*." And that "*Black male drug offenders received sentences that were 17.7 percent longer than White male drug offenders. In the Gall period the difference between these two groups was 13.1 percent*."

[117] They also relied on a report entitled "Racial Disparities in Sentencing" from the American Civil Liberties Union submitted to the Inter-American Commission on Human Rights at its 153rd session on 27th Ocotber 2014. This report states that a black defendant is 60 times more likely to receive a sentence of life without parole for drug offences than a white counterpart.

[118] The Respondents did not attempt to rebut this at the hearing nor did they adduce any rebuttal evidence to this in their post-trial materials. I am obliged to conclude that there is credible evidence that there is a risk of prejudice at the sentencing stage by reason on race of the Applicants are extradited to the United States.

[119] There can be no doubt that there is a great public interest in the BVI honoring its obligations under the extradition treaty. International cooperation is indispensible to fighting transnational drug trafficking. The United States is undoubtedly ready and able to effectively prosecute the Applicants in the United States. There are no domestic proceedings pending against the Applicants. On the other hand, the Applicants constitutional rights to personal liberty, freedom of movement and protection of family life are immediately engaged by the proposed extradition which represents a serious interference with those rights. In the circumstances of

this case, would the extradition of the Applicants represent an unreasonable and disproportionate interference with those rights?

[120] The particular circumstances of this case are that: (1) there is a final and un-appealable declaration that the BVI is the appropriate forum for the trial of the alleged offences; (2) the Applicants are citizen and belonger of the BVI; (3) the alleged offences are of a BVI nature; (4) the Applicants can be effectively tried here; (5) if extradited they are likely to receive long, disproportionate sentences; (6) they are likely to suffer prejudice from the United States system of pleas and at the sentencing stage by reason of their race; (7) and their trial has been unnecessarily delayed by these three extradition attempts during which they have had to endure alternating periods of freedom and remand. Taken together, all of these circumstances make out an overwhelming case that, at this juncture, it would be unjust and oppressive to extradite them to the United States and a disproportionate interference with their constitutional rights

[121] In light of these findings, I do not think it is necessary to go on to consider the third issue which is whether the Respondents have established a prima facie case against the Applicants.

[122] I therefore make the following orders.

(1) An Order of Habeas Corpus is granted for the immediate release and discharge of the Applicants.

(2) Costs are awarded to the Applicants on a prescribed basis, if not agreed.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar